NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515 February 6, 2006

Submitted as email attachment and by facsimile

Dear NEPA Task Force:

I am writing in behalf of the Appalachian Trail Conservancy (formerly the Appalachian Trail Conference) pursuant to the *Initial Findings and Draft Recommendations,* dated December 21, 2005, formulated by the Task Force on Improving the National Environmental Policy Act and the Task Force on Updating the National Environmental Policy Act.

The Appalachian Trail Conservancy (ATC) is a private, nonprofit, educational organization founded in 1925 to coordinate the efforts by both pubic agencies and private individuals and organizations to design, construct, maintain, and conserve the Appalachian Trail (A.T.) ATC has a membership base of approximately 37,000 individuals and also is a federation of 30 hiking and outing organizations, each of which maintain and manage an assigned segment of the Appalachian Trail primarily through the efforts of citizen volunteers.

The Appalachian Trail is a 2,175-mile footpath extending through fourteen states from Maine to Georgia along the crests and great valleys of the Appalachian Mountain chain. Initially constructed between 1922 and 1937, the trail gained federal recognition through the 1968 National Trails System Act as the nation's first National Scenic Trail. As a result of 1978 amendments to that act, federal and state land-acquisition programs have established a publicly owned right-of-way or "greenway" along all but ten miles of the footpath. The trail, which is now considered a unit of the National Park System, also passes through six other units of that System, as well as eight units of the National Forest System, and more than sixty state parks, forests, and game-management units forming an "emerald necklace" spanning much of the eastern United States. The trail also provides outstanding, low-impact outdoor-recreation opportunities for an estimated three to four million visitors each year.

During the past 30 years, the Conservancy and many of our affiliated organizations and volunteers have participated in dozens, perhaps hundreds of NEPA-related processes--both environmental assessments and environmental impact statements--associated with a variety of federal decisions ranging from forest-management plans to road- and facility-construction projects, to timber-management and mineral-extraction projects, as well as federally permitted road-construction, utility-transmission, and wireless-communications projects. Throughout that 30-year experience we have found the NEPA process to be a critical and effective process for evaluating the environmental and other impacts of federal and federally permitted decisions and as a means of engaging interested stakeholders and the public in those decision-making processes. It also is significant to note that not once during our experience with NEPA-supported processes have we found it necessary to appeal or to litigate the outcome of those processes.

Given our extensive experience with NEPA, we question the necessity or the advisability of modifying what has been characterized as the "Magna Carta" of environmental legislation—legislation that has withstood the test of time for 35 years. While the Task Force notes that the legislation has been revised only twice since its initial adoption in 1970, we question the conclusion that the time is now ripe for a significant or even minor overhaul of the legislation. In

fact, in just the past ten years, NEPA and its associated processes have undergone in-depth review by the Council on Environmental Quality (CEQ) in 1997 and again in 2003. Our understanding is that while both of those reviews yielded recommendations for improvements, primarily with respect to implementation of the process, neither proposed substantive statutory modifications. What changes in the circumstances surrounding NEPA have occurred in the past two years that now have created an imperative for significant reforms?

Notwithstanding our strong reservations about both the premise and the conclusions of the recent Task Force process, we nevertheless offer below our comments relative to many of the Task Force recommendations. Those comments are presented in the same order as they appear in the Task Force report, beginning with a summary of the recommendation (*in italics*) followed by our comments (in regular type).

Recommendation 1.1. *Amend NEPA to define "major federal action."* Unnecessary—The term "major federal action" is well defined in CEQ as well as other federal agency NEPA guidelines and by a substantial body of case law spanning more than 30 years.

Recommendation 1.2. *Amend NEPA to add mandatory timelines for the completion of NEPA documents (e.g. 18 months for environmental impact statements; 9 months for environmental assessments.)* Arbitrary and contrary to the fundamental intent of the Act--Federal and federally permitted decisions and actions range from relatively straightforward projects with few meaningful alternatives to highly complex projects with a full range of alternatives each requiring in-depth analysis. How, then, can a single timeline be applied across such a broad range of actions? Such a mandated timeline also could introduce the potential that impact assessment purposely could be delayed until the eleventh hour and then rushed forward to completion with limited or incomplete analysis and even more limited opportunities for public participation.

Recommendation 1.3. *Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions, Environmental Assessments, and Environmental Impact Statements*. Unnecessary—As noted with respect to Recommendation 1.1, there already exists within CEQ and federal agency guidelines sufficient direction and criteria to determine the most appropriate mechanism for evaluation.

Recommendation 1.4. *Amend NEPA to address supplemental NEPA documents*. Unnecessary—Again, this recommendation appears to be an attempt to apply a one-size-fits-all set of criteria to a wide assortment of federal agencies and an even broader assortment of decisions and projects and introduces terms such as "substantial changes" and "new circumstances" that are no more precise or quantitative than existing guidance related to supplemental documents.

Recommendation 2.1: *Direct CEQ to prepare guidelines giving weight to localized comments*. Contrary to the intent of the Act--Since NEPA applies to federal and federally permitted decisions and actions, the very nature of those actions are, by definition, potentially of interest to the American public as a whole. While local, state, and tribal stakeholders certainly may have legitimate interests in those decisions and actions, so too may many other groups and individuals. In some instances, such groups may possess viewpoints that are more objective, longer-range, or less driven by immediate outcomes than may be the case with some local interests.

Recommendation 2.2: *Amend NEPA to codify EIS page limits set forth in 40 CFR 1502.7 (e.g. less than 150 pages with a maximum of 300 pages.)* Arbitrary and potentially counterproductive—As noted above in reference to Recommendation 1.2 related to mandated timelines, mandated page limits seem equally arbitrary in view of the range of complexity of

issues and projects submitted for NEPA evaluation. Such guidelines simply may have the effect of shifting relevant information and analyses to appendices.

Recommendation 3.1. *Amend NEPA to grant tribal, state and local stakeholders cooperating agency status.* Counterproductive—In various other recommendations advanced by the Task Force it seems evident that there is a concern with the complexity and degree of coordination among a range of federal agencies that potentially can be engaged in a NEPA process. Given that concern, it is difficult to comprehend that automatically granting cooperating agency status to a potentially broad assortment of tribal, state, and local political subdivisions will reduce the complexity or improve the degree of coordination among the agencies.

Recommendation 3.2. *Direct CEQ to prepare regulations that allow existing state environmental review processes to satisfy NEPA requirements*. Premature and potentially contrary to the intent of NEPA--It is interesting to note that the Task Force in Recommendation 9.3 suggests that CEQ be required to conduct an analysis of the relationship of NEPA to a variety of state "mini-NEPA" processes as well as other federal environmental laws to assess the amount of overlap and to eliminate duplication. And yet here, in Recommendation 3.2, the Task Force appears to have already concluded—without benefit of such a study--not only that overlap or duplication may exist, but that any of the state environmental review processes are equal or superior to the federal process. The method by which the Task Force divined this conclusion is not disclosed in the Task Force report.

Recommendation 4.1. *Amend NEPA to create a citizen suit provision.* Proceed with caution--Certain aspects of this recommendation, such as requiring that the appellant demonstrate that s/he has been involved throughout the process and establishing a reasonable time period for filing a challenge could have merit, to the extent that such actions might have the effect of reducing frivolous and/or last-minute appeals or litigation by parties with little or no real stake in the issue. However, other aspects of this recommendation, such as requiring appellants to demonstrate that the (NEPA) evaluation was not conducted using best available information and science could place an unfair burden of proof on individual citizen appellants. Likewise, on its face, the recommendation to establish clearer guidelines to define which parties have standing may have merit, but it also could lead to an unreasonably limited definition of standing and thus exclude legitimate parties.

Recommendation 4.2. *Amend NEPA to add a requirement that agencies "pre-clear" projects*. Insufficient information—While the notion that CEQ might play a greater clearinghouse role in analyzing the outcomes of judicial proceedings and agency administrative decisions and then advising agencies with respect to applicability could have merit, further discussion of this recommendation is warranted and, in any case, such an enhanced role by CEQ could be implemented through regulatory guidance rather than by statutory mandate.

Recommendation 5.1. *Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible."* Unnecessary and contrary to the intent of the Act—We are not aware of any requirement compelling federal agencies to consider every conceivable "reasonable alternative" that may arise through the evaluation process. Moreover, the proposed requirement that alternatives would not have to be considered unless supported by feasibility and engineering studies could place an undue burden on legitimate stakeholders who may identify reasonable alternatives but lack the human or financial resources to conduct feasibility and engineering studies. By emphasizing the significance of such issues as cost, existing technologies, and socioeconomic consequences, the

recommendation also appears to grant special standing to those issues above all others that might be considered in the NEPA process.

Recommendation 5.2. *Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project*. Unnecessary—As the Task Force notes, there already is a requirement that a "no action alternative" must be included in the list of alternatives considered in a NEPA evaluation. If, as the Task Force appears to suggest, federal agencies are failing to subject no-action alternatives to the same analytical rigor as other alternatives, then that is a failure of the agency's implementation--not the Act—and could be addressed through clarifying regulatory guidance.

Recommendation 5.3. *Direct CEQ to promulgate regulations to make mitigation proposals mandatory (including a requirement that agencies include with any mitigation proposal a binding commitment to proceed with mitigation.)* Support—We support this recommendation, especially with respect to the notion of requiring mitigation by a private applicant to be legally enforceable, but also because we realize that not all agencies consistently implement and monitor mitigation measures identified in the "preferred alternative" or in the decision document.

Recommendation 6.1. *Direct CEQ to promulgate regulations to encourage more consultation with stakeholders*. Support, with reservations—While it is difficult to question any recommendation ostensibly intended to encourage consultation among federal agencies and stakeholders, it is surprising that a CEQ requirement compelling agencies to periodically consult in a formal way with interested parties throughout the NEPA process is viewed as a necessary action since such consultation should be a matter of commonsense. However, the relationship between such a requirement and other federal statutes—particularly the Federal Advisory Committee Act (FACA)—which some agencies, unfortunately, have had a tendency to frequently cite as grounds for avoiding consultation—should be explored and addressed.

Recommendation 6.2. *Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies*. Unnecessary—Our impression is that sufficient authorities exist or could be further clarified in regulation to permit the designation of a lead agency in NEPA evaluations involving multiple agencies and to assign appropriate responsibilities to that role.

Recommendation 7.1. *Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality*. Insufficient information—While we have no immediate objection to this recommendation, the scope of authorities assigned to such an ombudsman is not sufficiently described to permit a conclusion for or against the recommendation. Moreover, we find the stated purpose ("to offset the pressures put on agencies by stakeholders") to be more than mildly provocative.

Recommendation 7.2. *Direct CEQ to control NEPA related costs*. Insufficient information—While the desire to contain costs associated with NEPA no doubt will have broad appeal, it is impossible to fully endorse this recommendation without clarification surrounding the sorts of recommendations CEQ might propose in response to its costs assessment. We also are skeptical about the effectiveness of developing "cost-ceiling policies" for the same reasons we questioned several other Task Force recommendations suggesting arbitrary or one-size-fits-all guidelines. In any case, should CEQ undertake such an analysis, we also hope that the analysis will consider the *cost savings* that have arisen as a result of the rigorous application of NEPA by identifying ill-conceived, short-sighted, or wasteful federal or federally permitted projects.

Recommendations 8.1. *Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts...by establishing that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions*. Insufficient—Evaluating only existing environmental conditions will not necessarily clarify the relationship among past, current, and future actions and the combined or cumulative impacts associated across that continuum. In general, our experience with the NEPA process has illustrated that evaluation of cumulative impacts—particularly those arising from multiple federal decisions or projects affecting similar resources and ecosystems—have been poorly understood and documented.

Recommendation 8.2. *Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis (e.g. "concrete" proposed actions rather than actions that are "reasonably feasible.")* Questionable—Like a number of other Task Force recommendations, this recommendation assumes that it is feasible to establish clear and uniform definitions related to proposed actions that can be applied across the full range of federal actions and projects. Is our understanding of the future so crystal clear that we can determine today which future actions may be fairly characterized as "concrete" and which actions are only "reasonably feasible"?

Recommendation 9.1. *(Direct the) CEQ (to) study NEPA's interaction with other Federal environmental laws*. Insufficient—While there could be value in evaluating the interaction between NEPA and other environmental laws, the objective should not be limited to identifying and eliminating duplication as this recommendation suggests. In particular, we strongly recommend that the scope of such a study should be expanded to include an analysis of the unfortunate tendency on the part of the Congress in the past several years to seek to limit, thwart, or circumvent the application of NEPA to certain forms of federal actions, including a number of transportation, resource-management, and energy-related projects. (See H.R. 6, the Energy Policy Act of 2005, Sections 1702, 1808, 2014, and 2601, as well as the Healthy Forests Restoration Act of 2003 and various "sufficiency" findings in appropriations acts). The study should include recommendations intended to discourage this spurious practice and to amend any adopted legislation that contains provisions that are deemed incompatible with NEPA and associated CEQ and agency guidelines.

Recommendation 9.2. *(Direct the) CEQ to study current Federal agency NEPA staffing issues*. Support—We support such a study—in particular, any meaningful recommendations for improving retention and recruitment of experienced and qualified personnel.

Recommendation 9.3. (*Direct the) CEQ to study NEPA's interaction with state "mini-NEPAs" and similar laws*. Insufficient—Again, as with Recommendation 9.1, the purpose of such a study should not be limited solely to identifying and eliminating duplication. Such a study also should assess the *adequacy* of state environmental assessment processes vis-à-vis federal processes, particularly if the real intent behind this recommendation (see Recommendation 3.2) is to suggest that such state processes can serve as an adequate or even superior surrogate for federal processes—a proposition that, based on our own experience with both federal and state environmental-impact assessment processes, is highly debatable.

In conclusion, we believe that NEPA and its associated environmental-impact assessment processes has proven to be a highly effective means for evaluating potential impacts of federal and federally permitted decisions and actions and has resulted, directly and indirectly, in improving the quality of decision making and minimizing adverse environmental and socio-economic impacts of federal actions in a fiscally responsible manner. While no process applied to

the diverse range and complexity of federal actions is likely to be completely flawless, whatever limitations exist related to NEPA primarily involve implementation of the process across a wide assortment of federal agencies that can be addressed most effectively through improved inter-agency coordination and regulatory guidance with little or no modifications to the parent statute.

Thank you for the opportunity to comment on this important issue.

Sincerely,

David N. Startzell
Executive Director